SUPREME COURT, U.S.

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No. 440

# In the Supreme Court of the United States

OCTOBER TERM, 1952

UNITED STATES OF AMERICA, PETITIONER

*v.*

GILBERT ASSOCIATES, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

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# In the Supreme Court of the United States

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No. 440

UNITED STATES OF AMERICA, PETITIONER

*v.*

GILBERT ASSOCIATES, INC., ET AL.

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

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The Acting Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Hampshire entered July 1, 1952, in part affirming and in part reversing the decree of the Superior Court of the State of New Hampshire entered August 22, 1951.

### OPINION BELOW

The Superior Court of New Hampshire rendered no opinion. The opinion of the Supreme Court of New Hampshire (R. 6) is reported at 90 A. 2d 499.

### JURISDICTION

The judgment of the Supreme Court of New Hampshire was entered July 1, 1952 (R. 5). The

IN THE SUPERIOR COURT

No. 4325

Gilbert Associates, Inc.

In Receivership

MOTION OF THE UNITED STATES OF AMERICA TO SET ASIDE DECREE

The United States of America moves as follows:

(1) That that part of the decree wherein the Court found and ruled "that the taxes assessed by the Town of Walpole on April 1, 1947 and on April 1, 1948, in the sum of $1,303.80, created specific and perfected liens, which are prior to, and superior to, the claims of the United States" be set aside;

(2) That the Court find and rule that the claims of the United States for taxes amount to $4,035.34, and have priority over the claims of the Town of Walpole and that the United States is entitled to the full balance of the money in the hands of the Receiver.

Respectfully submitted,

JOHN J. SHEEHAN,
*United States Attorney.*

Sept 1, 1951.

Motion denied.

HAROLD E. WESCOTT,
*Pres. Justice.*

IN SUPREME COURT OF NEW HAMPSHIRE

DOCKET ENTRIES

Docket Entries in New Hampshire Supreme Court

#4122 Petition of Gilbert Associates, Inc.

Bell & Davis for petitioner.

Philip H. Faulkner, George R. Hanna, for Town of Walpole.

John J. Sheehan, Robert D. Branch, for claimant United States of America.

Cheshire: Entered April 10, 1952.

Briefs of United States of America and Town of Walpole filed May 8, 1952.

Hearing June Session, 1952.

July 2, 1952. DUNCAN, *J.*

Exceptions of United States of America overruled; exception of Town of Walpole sustained.

July 10, 1952. Motion for rehearing filed by U. S. A.
July 30, 1952. Motion for rehearing denied.
July 31, 1952. Motion to stay execution filed and granted.
Aug. 31, 1952. Certificate of order of Court forwarded.
Oct. 28, 1952. Petition for Certiorari to United States Supreme Court filed.

Clerk's Certificate to foregoing paper omitted in printing.

## IN SUPREME COURT OF NEW HAMPSHIRE

### Opinion—July 1, 1952

### Petition of Gilbert Associates, Inc.

Interlocutory Proceedings in a receivership, to determine the relative priority of claims of the United States of America and of the town of Walpole against the estate of the insolvent corporation, hereinafter called the defendant. The estate consists of a balance derived from the sale of the defendant's machinery, and amounting to $2,642.91 after payment of fees and expenses of administration. Each of the claimants claims to have had liens upon the machinery, which was formerly in the defendant's electroplating plant in Walpole. It is not disputed that the plant was in a rented building, and that the taxes which the town seeks to recover were assessed against the machinery as real estate.

The town sought to recover property taxes for the years 1947 to 1950 inclusive. The United States of America sought to recover employment, withholding and corporate income taxes which accrued "for various periods between 1943 and June 30, 1948". The dates when the assessment lists relating to these taxes were received by the Collector of Internal Revenue did not appear but it was undisputed that a notice of tax liens in the amount of $3,171.97 was filed in the office of the Clerk of the United States District Court for the District of New Hampshire on August 6, 1948.

Hearing by the Court (*Wescott*, J.) upon facts submitted by agreement of the claimants. The following findings and rulings were made: "The Court finds and rules that the taxes assessed by the Town of Walpole on April 1, 1947 and April 1, 1948, in the total amount of $1,303.80, created specific and perfected liens which are prior to, and superior to, the claims of the United States. The tax claims of the United States are found to be superior to the claims of the town for taxes assessed in 1949 and 1950. Expenses of the Receivership do not include the taxes assessed by the town of Walpole on April 1, 1950."

The town excepted to the findings and rulings by which the claims of the United States were found superior to the claims of

the town. The United States excepted to the findings and rulings by which the municipal taxes for 1947 and 1948 were held to have created liens prior and superior to the claims of the United States. The United States likewise excepted to the denial of its motion that the portion of the decree in favor of the town be set aside, and that the Court find and rule that the United States is entitled to the full balance in the hands of the receiver. The exceptions of the United States were reserved and transferred, and the bill of exceptions of the town was allowed by the Presiding Justice.

*John J. Sheehan*, United States District Attorney and *Robert D. Branch*, Assistant United States District Attorney, (*Mr. Branch* orally), for the claimant United States of America.

*Philip H. Faulkner* and *George R. Hanna* (*Mr. Hanna* orally), for the claimant town of Walpole.

DUNCAN, J. The chronology of events affecting the rights of the claimants was as follows: April 1, 1947, town property tax, $612.95; April 1, 1948, town property tax, $690.85; August 6, 1948, notice of tax lien filed by United States of America; August 24, 1948, defendant's property advertised for 1947 property taxes; September 25, 1948, defendant's property sold for 1947 tax; April 1, 1949, town property tax, $383; August 12, 1949, temporary receivers appointed; August 23, 1949, defendant's property advertised for 1948 property tax; September 24, 1949, defendant's property sold for 1948 tax; January 30, 1950, permanent receiver appointed; April 1, 1950, town property tax, $421. The dates of assessment of the annual property taxes do not appear.

The town's exception to the decree that the claim of the United States has priority over the claim of the town for the 1949 tax has been expressly waived.

The United States takes the position that the defendant's machinery was personal property, and relies upon the decision in *Flack* v. *Byce Agency, Inc.*, 96 N. H. 335, for the proposition that no lien for taxes attaches to personalty. This argument is sufficiently answered by statute. Machinery is taxable as real estate (R. L., *c.* 73, *s.* 8; *Kolodny* v. *Laconia*, 96 N. H. 337) and as such is made subject to a lien "for all taxes thereon". R. L., *c.* 80, *s.* 17. If it may be personal property for purposes other than taxation the force of the tax statute is not affected. *Kolodny* v. *Laconia*, *supra*; *O'Donnell* v. *Meredith*, 75 N. H. 272; *Hedding &c. Assn.* v. *Epping*, 88 N. H. 321, 322, 323. The tax becomes due on April 1 (R. L., *c.* 74, *s.* 1; *c.* 75, *s.* 1; *Saidel* v. *Felsher*, 83 N. H. 582), is required to be assessed before July 1 (R. L., *c.* 77, *s.* 9, amended by Laws 1947, *c.* 221) and is secured by a lien upon the real estate upon which it is assessed continuing "until one year from October first following the assessment". R. L., *c.* 80, *s.* 17. It is settled by our decisions that the assessment of a tax is in the nature of a

judgment, enforced by a warrant instead of an execution. *Boody v. Watson* 64 N. H. 162, 167; *Jaffrey v. Smith*, 76 N. H. 168, 171; *Nottinghdm v. Company*, 84 N. H. 419. See also *Automatic Sprinkler Corp. v. Marston*, 94 N. H. 375. In execution of the warrant real estate and property taxable as such may be sold in foreclosure of the statutory lien. R. L., *c.* 80, *s.* 18. The defendant's machinery was properly taxed as real estate, and was subject to the lien in such case provided.

The liens which the United States seeks to enforce arise under the provisions of 26 U. S. C. *s.* 3670, providing that a tax which the tax-payer neglects or refuses to pay shall be a lien in favor of the United States "upon all property and rights to property . . . . belonging to such person." Such lien arises when the assessment list is received by the collector (*s.* 3671), subject to the qualification that it "shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed" in the office of the Clerk of the United States District Court (*s.* 3672). It is argued that the town does not come within the class of persons entitled to the benefit of the latter section, while the town asserts that it is protected as a "judgment creditor".

It cannot be doubted that the interpretation of the statute is a question of federal law. *United States* v. *Security Tr. & Sav. Bk.*, 340 U. S. 47. Judgment creditors in order to be protected must have judgments which are secured by liens (*Miller* v. *Bank of America*, 166 F. (2d) 415) and under the statute such liens are entitled to priority only when they attach before notice of the federal lien is filed in compliance with section 3672. The liens of the town for taxes for the years 1947 and 1948 clearly arose before August 6, 1948, the date upon which notice of the liens of the United States was filed with the Clerk of the District Court. In the light of the principle that a tax assessment is in this jurisdiction a judgment no reason is apparent why the town does not qualify as a judgment creditor within the meaning of the federal statute. *Jaffrey* v. *Smith*, *supra*; *In re Northwest Wood Products Co.*, 168 F. 2d 639. The liens of the town, having attached prior to the filing of notice of the federal liens, were not affected by them because of the provisions of section 3672. Moreover, under the provisions of section 3670, liens of the United States arising after the liens of the town would attach only to the interest of the defendant in the property as it then stood. After April 1 of any year (or at least after assessment for such year, *Dana* v. *Colby*, 63 N. H. 169), title to the machinery was encumbered by the lien of the town for the tax for such year (R. L., *c.* 80, *s.* 17, *supra*; *Saidel* v. *Felsher*, *supra*); and the defendant was thereby divested of its rights to the extent of the lien. It does not appear that the liens of the United States arose before the rights of the defendant were thus diminished.

The United States further relies upon 31 U. S. C. s. 191, which provides in part: "Whenever any person indebted to the United States is insolvent . . . the debts due to the United States shall be first satisfied; . . . " This section creates no lien in favor of the United States but affects priority only. *United States* v. *O'Dell*, 160 F. (2d) 304. Although the question has never been determined by the United States Supreme Court, the decisions of that court strongly indicate that the priority established by this section may be overcome by a "fully perfected and specific lien". *Illinois* v. *Campbell*, 329 U. S. 362, 370. See also, *Spokane County* v. *United States*, 279 U. S. 80; *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Knott*, 298 U. S. 544; *United States* v. *Texas*, 314 U. S. 480; *United States* v. *Waddill Co.*, 323 U. S. 352; *United-States* v. *Security Tr. & Sav. Bk.*, *supra*. In *State* v. *Woodroof*, 253 Ala. 620, 630, the rule was stated as follows: "As applied to a . . . claim of a lien for taxes, such lien is specific and effective if the amount of it has been fixed by a proceeding which is binding and conclusive at the date of receivership and not open for change in any sort of proceeding which might arise thereafter; and that the lien upon the property which was received by the receiver was not dependent upon any contingency subject to selection, shift or change, and nothing remained to be done then or thereafter to make such lien complete, specific or perfect, or to liquidate the debt, and nothing could be done thereafter to discharge the debt or subordinate such lien but full payment of the debt."

The effect of the federal statute depends upon the status of the lien at the time when insolvency occurs. *United States* v. *Massachusetts*, 333 U. S. 611. For purposes of this case that time was August 12, 1949, so far as the record discloses, that being the date upon which temporary receivers were first appointed. As the brief of the United States appears to recognize, in order to overcome the priority established by section 191, a lien must be definite in three respects, as of "the crucial time". (1) The identity of the lien owner, (2) the amount of the lien, and (3) the property to which it attaches must be definitely established. *Illinois* v. *Campbell*, *supra*, 375.

There can be no question but that the town's lien for the 1947 taxes complied with these requirements. The machinery had been both advertised and sold to the town before insolvency arose. Thus the lien had not only been perfected but foreclosure had been instituted. While advertisement and sale for the 1948 tax did not occur until after August 12, 1949, we are not satisfied that the Trial Court erred in ruling that the lien for that year's taxes was "likewise specific and effective". The amount was no longer subject to change upon abatement or appeal, the time for such action having long previously expired. R. L., c. 77, s. 14. The fact that advertisement and sale had not then taken place, does not establish

that the lien was not perfected. Like the foreclosure of a mortgage, the sale for taxes was a method of enforcement rather than perfection of the lien. On August 12, 1949, all that was required to fully perfect the lien had been accomplished and what was thereafter done was in collection of the tax. The amount of the lien and the property to which it attached were then definitely established. *Cf. United States* v. *Reese*, 131 F. (2d) 466. In the language of *United States* v. *Texas*, *supra* 487, the property was specific and constant; the amount secured, both liquidated and certain. In our opinion the exceptions of the United States should be overruled. *State* v. *Woodroof*, *supra*; *Regan* v. *Metropolitan Haulage Co.*, 127 N. J. Eq. 487; *In re Berger's Estate*, 94 N. E. (2d) 248; *In re Meyer's Estate*, 159 Pa. Super. 296; *Ernst* v. *Guarantee Millwork*, 200 Wash. 195; *First Nat'l Bank* v. *Southland Production Co.*, 189 Okla. 9, 14-18.

There remains for consideration the exception of the town to the ruling that expenses of the receivership did not include the 1950 tax, and that the claims of the United States are superior to the claim of the town for the tax for that year. No claim is made by the United States to preference over the expenses of receivership, which are commonly considered to come ahead of taxes. *Petition of N. H. Structural Steel Co.*, 90 N. H. 547; *Kennebec Box Co.* v. *O. S. Richards Corp.*, 5 F. (2d) 951; *In re Holmes Mfg. Co.*, 19 F. (2d) 239; *Hammond* v. *Carthage Sulphite Pulp & Paper Co.*, 34 F. (2d) 155. See *United States* v. *Emory*, 314 U. S. 423, 424. The property tax for 1950, however, was assessed upon assets in the hands of the permanent receiver. In these circumstances it constituted "consideration for governmental benefits enjoyed by this property" while in the possession of the receiver, which the court might properly order paid. *Bear River Paper & Bag Co.*, v. *City of Petoskey*, 241 Fed. 53, 57. See also, *McKenzie* v. *Standard Bleaching Co.*, 109 N. J. E. 429, 433, 434. As such it became an "expense of operation". (*Central Vermont R. Co.* v. *March*, 59 F. (2d) 59, 62) and was "the price . . . for protection and security". *Michigan* v. *Michigan Trust Co.*, 286 U. S. 334, 344. Accordingly, the 1950 tax is held to have been an expense of receivership. 2 Tardy's Smith on Receivers (2d *ed.*) *ss.* 678, 679; High on Receivers (4th *ed.*) *s.* 811a; 45 Am. Jur. 320, 324. As such it is entitled to priority over the claims of the United States.

*Exceptions of the United States of America overruled; exception of the town of Walpole sustained.*

All concurred.

## IN THE SUPREME COURT OF NEW HAMPSHIRE

GILBERT ASSOCIATES, INC., IN RECEIVERSHIP

MOTION OF THE UNITED STATES OF AMERICA FOR REHEARING

The United States of America moves that it be granted a rehearing for the following reasons:

(1) The Court erred in holding that the tax liens of the Town were perfected and specific on April 1 of the year of levy since there was no evidence submitted which indicated the date upon which the actual assessment was made, and the tax could not be liquidated until such assessment was made.

(2) The Court erred in holding that an assessment of a tax constitutes a judgment within the meaning of 26 U. S. C. 3672.

(3) The Court erred in failing to give to the Federal taxes, the force and effect of a judgment.

(4) The Court erred in failing to award the United States priority under 31 U. S. C. 191.

A brief in support of this motion for rehearing is submitted herewith.

Respectfully submitted,

United States of America,

By (S.) JOHN J. SHEEHAN,
*United States Attorney.*
(S.) ROBERT D. BRANCH,
*Assistant U. S. Attorney.*

July 9, 1952.

I hereby certify that I have, this day, mailed a copy of the foregoing motion and brief in support thereof to Philip H. Faulkner, Esq. and George R. Hanna, Esq., 5 St. James Street, Keene, New Hampshire, attorneys for the Town of Walpole.

(S.) JOHN J. SHEEHAN,
*United States Attorney.*

MOTION FOR STAY OF EXECUTION (Omitted in printing)

ORDER STAYING EXECUTION AND ENFORCEMENT OF DECREE (Omitted in Printing)

Clerk's Certificate to foregoing transcript omitted in printing.

## SUPREME COURT OF THE UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner and of the issues as disclosed by the opinion in 90 A. 2d 499, and in view of my conviction that petitioners for certiorari should not be needlessly delayed,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 7, 1952.

(S.) FELIX FRANKFURTER,
*Associate Justice of the Supreme Court of the United States.*

Dated this 28th day of October, 1952.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1952 329349 932

Town's 1947 tax. The second "sale" of the same property for the Town's 1948 tax did not occur until subsequent to the appointment of the temporary receivers. The type of property and the fact that more than one "sale" was made of the same property make it extremely doubtful that the first "sale," which took place prior to the appointment of the receiver, perfected the Town's lien for taxes. See *Illinois* v. *Campbell*, 329 U. S. 362; *United States* v. *Texas*, 314 U. S. 480.

The Town's lien was merely a *lis pendens* notice that a right to perfect a lien existed. Such a lien has never been held to defeat the federal priority under Section 3466 merely because it protects the lienor against others than the Government, since it is also contingent upon taking subsequent steps for enforcing it.[3] *New York* v. *Maclay*, 288 U. S. 290; *United States* v. *Texas*, 314 U. S. 480; *Spokane Merchants' Assn.* v. *State*, 15 Wash, 2d 186, 130 P. 2d 373; *Thelusson* v. *Smith*, 2 Wheat. 396; *United States* v. *Waddill Co.*, 323 U. S. 353; *United States* v. *Oklahoma*, 261 U. S. 253; *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386.

3. The question of whether an adverse lien, even though specific and perfected, defeats the Government's priority under Section 3466 of the Revised Statutes has been posed and left unanswered by this Court in several cases. *E.g.*, *Spokane County* v. *United States*, 279 U. S. 80, 95; *New York* v. *Maclay*, 288 U. S. 290, 294; *United States* v. *Texas*,

[3] The court below held here that the "sales" were "a method of enforcement rather than perfection of the lien" (R. 9).

314 U. S. 480, 485-486; *Michigan* v. *United States*, 317 U. S. 338, 341; *United States* v. *Waddill Co.*, 323 U. S. 353, 355-356. The question is an important and recurring one which should be decided by this Court.

It is our position that under this section the Government is entitled to priority in all cases except where the legal title of the taxpayer has been in some measure divested (or possession changed) before the federal tax or other indebtedness became due. See *New York* v. *Maclay*, 288 U. S. 290, 293-294; *Thelusson* v. *Smith*, 2 Wheat. 396. The Government's priority attaches to all of the property of the debtor, and an adverse lienor acquires no interest in the property, but merely a power over it. See *Conard* v. *Atlantic Insurance Co.*, 1 Pet. 386, 444. Thus, even though a lien is fully perfected and specific, it cannot defeat the priority of the Government.

In any event, in every case in which the question of whether a fully perfected and specific lien defeats the priority of the United States under Section 3466 was sought to be raised, this Court has found that the lien involved therein was not fully perfected and specific. (*Supra*, pp. 10-11.) We believe that the instant case is controlled by the principles of those decisions and that the New Hampshire court erred in holding that the municipal property assessment was a fully perfected and specific lien. We further believe that this latter issue is alone patently important enough to warrant the issuance of the writ of certiorari. But

if we are wrong on this issue, then, we submit, the even more important question is presented: whether a fully perfected and specific lien does take priority over the United States in Section 3466 situations.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT L. STERN,
*Acting Solicitor General.*

NOVEMBER, 1952.

APPENDIX

Internal Revenue Code:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1946 ed., Sec. 3670.)

SEC. 3672 [As amended by Section 401 of the Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505 of the Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

* * * * *

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law au-

thorized the filing of such notice in an office within the State or Territory; * * *

* * * * * *

(26 U. S. C. 1946 ed., Sec. 3672.)

Revised Statutes:

Sec. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority hereby established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

(31 U.S.C. 1946 ed., Sec. 191.)

Revised Laws of New Hampshire (1942):

c. 73:

8. *Buildings, etc.* Buildings, mills, machinery, wharves, ferries, tollbridges, locks and canals and aqueducts owned by private parties, any portion of the water of which is sold or rented for pay, are taxable as real estate.

c. 74:

1. *Residents.* Every person shall be taxed in the town in which he is an inhabitant or resident on April first, for his poll and estate, except in cases otherwise provided by law.

c. 75:

1. *Annual List.* The selectmen of each town shall annually, in April, make a list of all the polls and take an invoice of all the estate liable to be taxed in such town on the first day of that month.

c. 77:

1. *How Assessed.* All property taxes for any year following April first shall be assessed upon the invoice taken in that month.

* * * * * *

5. *Record.* A fair record shall be made of every invoice taken by the selectmen, and of all taxes by them assessed, in a book of records of the doings of the selectmen in their office, which shall be the property of the town; and a copy thereof shall, prior to July first, be left with the town clerk, or the original invoice and assessment shall be so left and recorded by him, and both records shall be open to the inspection of all persons.

* * * * *

8. *Lists; Real Estate.* The list of taxes assessed on real estate shall contain the name of the owner, if known; otherwise the name of

the lot and range, if lotted, otherwise such description as the land may be readily known by; the number of acres if known; and the amount of taxes assessed thereon.

9. [As amended by c. 221 of the Laws of New Hampshire (1947)]. *Delivery; Notice.* Such list shall be delivered to the collector on or before July first of each year, but upon application by the assessors, or upon its own motion, the tax commission for good cause may extend the time of such delivery. The collector shall, on or before September first, or within thirty days after the receipt of such list by him, send to every person taxed, or his agent, if known, a bill of his taxes.

c. 80:

17. *Lien.* The real estate of every person or corporation shall be holden for all taxes assessed against the owner thereof; and all real estate to whomsoever assessed shall be holden for all taxes thereon. All such liens shall continue until one year from October first following the assessment.

18. *Sale.* Such real estate may be sold by the collector, in case the owner or person to whom the same is assessed shall die or remove from town and leave there no personal estate on which distress can be made; or in case such person or corporation shall neglect or refuse to expose goods and chattels whereon distress may be made; or in case such tax shall not be paid on or before December first next after its assessment.

22. *Conduct of Sale.* Every such sale shall be at auction, in some public place in the town or place where the land is situated, and between the hours of ten in the forenoon and six in the afternoon, and shall be of so much of the estate holden as will pay the taxes and incidental charges; but, if necessary, the sale may be adjourned from day to day, not exceeding three days, by proclamation made at the place of sale within the hours aforesaid.

* * * * *

24. *Report of Sale.* Each tax collector, within six days after selling any real estate for taxes, shall deliver or forward by registered mail to the register of deeds for the county in which the real estate is situated a statement of the following facts relating to each parcel of real estate sold, certified by him under oath to be true: To whom the real estate was taxed, as it appears in the tax list committed to him; the description of the property as it appears in said list; the amount of the taxes for which the sale was made and the person against whom they were assessed; the date of the sale; the name of the purchaser; the sum paid or to be paid by the purchaser; a description of the parcel or interest sold; and a statement of the officer's fees and expenses in giving notices, making the sale and delivering the same to the register, which statements shall be recorded and indexed by the register as provided in section 29.

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petition of the United States for a rehearing was denied on July 30, 1952 (R. 5). On October 28, 1952, Mr. Justice Frankfurter extended the time for filing a petition for a writ of certiorari to and including November 7, 1952 (R. 11). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1257 (3).

## QUESTIONS PRESENTED

1. Whether the mere assessment of a property tax by a municipality is a "judgment" within the meaning of Section 3672 of the Internal Revenue Code so as to defeat the lien of the United States accorded by Section 3670 of the Code.

2. Whether the lien of the Town of Walpole which allegedly attached to the property of the insolvent corporation is, under the decisions of this Court, a "fully perfected and specific" lien.

3. If question (2) is answered in the affirmative, whether such a "fully perfected and specific lien" takes precedence over debts owed the United States, notwithstanding the priority accorded the United States in the collection of debts owed by an insolvent under R. S. 3466 (31 U. S. C. 191).

## STATUTES INVOLVED

The pertinent statutes are reproduced in the Appendix, pp. 13-17 *infra*.

## STATEMENT

Temporary receivers were appointed for Gilbert Associates, Inc., the taxpayer, on August 12, 1949 (R. 6). A permanent receiver was appointed January 30, 1950 (R. 6). These are state court pro-

ceedings to determine the relative priority of tax claims of the United States and of the Town of Walpole against the estate of the insolvent taxpayer.

Taxpayer operated an electroplating plant in a rented building in the Town of Walpole. Its property, machinery, was sold at auction, and after the payment of expenses of administration and fees, a balance was left in the hands of the receiver in the sum of $2,642.91. (R. 5.)

The claims of the United States are for employment, withholding and corporate income taxes for various periods between 1943 and 1948 amounting to $4,035.34 (R. 4), as to which a notice of lien in the amount of $3,171.97 was filed in the office of the Clerk of the United States District Court for the District of New Hampshire on August 6, 1948 (R. 5).

The Town's claims are for property taxes for the years 1947 and 1948, amounting to $1,303.80 [1] (R. 6). The dates of the assessments of these taxes do not appear in the record (R. 6). On September 25, 1948, the property was sold for the Town's 1947 taxes; and on September 24, 1949, the same property was sold for the Town's 1948 taxes (R. 6).

On the above facts the New Hampshire Superior Court ruled that the assessment of the taxes by the

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[1] The Town's claims originally included property taxes for the years 1949 and 1950. It has conceded that its claim for 1949 taxes is not entitled to priority. The New Hampshire Supreme Court has held that the Town's 1950 taxes are entitled to priority as an administration expense (R. 9). This ruling is not questioned here.

Town created specific and perfected liens which were prior to and superior to the claims of the United States (R. 3). The Supreme Court of New Hampshire affirmed on the grounds both that the Town's assessments were "judgments" within the meaning of Section 3672 of the Internal Revenue Code, and that the Town's liens were "specific and effective," thus defeating the lien and the priority of the United States under R. S. 3466—not only as to the 1947 Town taxes for which the property was sold prior to the appointment of the temporary receivers, but also as to its 1948 taxes for which the property was sold after such appointment (R. 5-9).

## SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that a municipal property tax assessment constitutes a judgment within the meaning of Section 3672 of the Internal Revenue Code.

2. In holding that a municipal property tax assessment constitutes a fully perfected and specific lien.

3. In holding that such a fully perfected and specific lien takes priority over a tax claim of the United States in the distribution of the assets of an insolvent debtor.

4. In giving the Town of Walpole priority, in the collection of its property tax assessment out of the estate of the insolvent taxpayer, over the tax claim of the United States.

REASONS FOR GRANTING THE WRIT

1. The decision below is clearly erroneous in holding that the mere assessment of the Town taxes made the Town a "judgment creditor" within the meaning of Section 3672 of the Internal Revenue Code. The question is an important and recurring one in the administration of the federal tax law.

a. Section 3670 of the Internal Revenue Code provides that a federal tax which is not paid becomes a lien "upon all property and rights to property, whether real or personal, belonging to such person." Section 3672 of the Code provides that this lien "shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed." In holding that the mere assessment of the Town taxes made the Town a "judgment creditor" within the meaning of Section 3672, the Supreme Court of New Hampshire has provided a method of avoiding the effect of Section 3672 by nothing more than an emphasis upon words without analysis of their incidents. If the construction of the section made by the state court is followed, the application of the law will depend on the label applied by the state law to tax claims, and not on what they in fact are. Nor is the device utilized by the New Hampshire court necessarily limited to that state. For example, the statutes of at least the states of California, Florida, Montana and Utah, provide in terms that assessments of taxes shall

have the force and effect of judgments.[2] Those states which do not have the "judgment" language in their statutes may reach the same result by judicial decision, as practically all states provide for assessment of local taxes, and subsequent enforcement by execution or warrant. *E.g., In re Northwest Wood Products Co.,* 168 F. 2d 639 (C. A. 7).

Further, the decisions of the courts as to the effect of these local statutes in determining the applicability or non-applicability of Section 3672 of the Internal Revenue Code are in substantial conflict though the local assessment procedure be substantially the same. Thus, in *In re Capitol Cleaners and Dyers,* 233 P. 2d 377 (Utah), it was held that a local tax obligation which was given by Utah statute the effect of a judgment was not a "judgment" as that term is used in Section 3672. It was there pointed out that the question is a federal one, and it was held that the local statute describes the liability of a taxpayer and the method of procedure in collecting the tax, and does not characterize the local government as a judgment creditor. In *In re Northwest Wood Products Co.,* 168 F. 2d 639 (C. A. 7), it was held that because a Wisconsin statute, as construed by the Wisconsin courts, made a claim of the state Industrial Commission a judgment in legal effect, the Commission was a judgment creditor within the meaning of

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[2]-Deering's California Code (1944), Revenue and Taxation, Sections 2186, 2187 and 2194; Florida Statutes Annotated (1943), Taxation and Finance, Section 193.49; Revised Code of Montana (1947), Taxation, Section 84-3807; Utah Code Annotated 1943, Section 80-10-1.

Section 3672. And here, the state court has held that the mere assessment of the Town taxes made the Town a judgment creditor within the meaning of Section 3672.

b. The history of the enactment of Section 3186 of the Revised Statutes, the precursor of Section 3672, shows that the term "judgment creditor" is used "in the conventional sense." *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 52 (concurring opinion). See *MacKenzie* v. *United States*, 109 F. 2d 540 (C. A. 9); S. Rep. No. 1315, 62d Cong., 3d Sess., p. 1; H. Rep. No. 1018, 62d Cong., 2d Sess., p. 1. Traditionally, of course, a judgment is the sentence of the law pronounced by the court. 3 Blackstone's Commen. 395. Clearly, under its generally accepted meaning a judgment is procured in a court proceeding and does not include determinations made by administrative officers. See *Karl Kiefer Mach. Co.* v. *U. S. Bottlers Machinery Co.*, 108 F. 2d 469, 470 (C. A. 7); *Samuel Goldwyn, Inc.* v. *United Artists Corp.*, 113 F. 2d 703 (C. A. 3); *G. Amsinck & Co.* v. *Springfield Grocer Co.*, 7 F. 2d 855 (C. A. 8).

Prior to the enactment of the amendment of Section 3186 by the Act of March 4, 1913, c. 166, 37 Stat. 1016, the section contained no provision for priority of any third party over a federal tax lien. The courts had held that no third parties, not even innocent purchasers for value, were protected under any circumstances from an unrecorded federal tax lien. See *United States* v. *Snyder*, 149 U. S.

210. In so far as is material here, the protection afforded by the amendment from an unrecorded federal tax lien was limited to "any mortgagee, pledgee, purchaser or judgment creditor." State or local taxes were not included. It therefore seems clear that Congress did not intend to subordinate federal tax liens to state taxes merely because under state statute or court decisions they are automatically treated as the "equivalent," for some local purposes, of a judgment. Thus, when the court below spoke of the assessment as being "in the nature of a judgment" (R. 6-7), it said no more than that for some purposes its decisions had accorded an assessment some of the attributes of a conventional judgment. See *Jaffrey* v. *Smith*, 76 N. H. 168. It in no way placed this kind of assessment in a different category from an administrative assessment to be followed by a warrant sale. And the statutory scheme shows clearly that there is little similarity between a conventional judgment and the assessment of municipal property taxes. Revised Laws of New Hampshire (1942), c. 73, 74, 75, 77, 80 (Appendix, pp. 14-17 *infra*).

2. The decision below that the mere assessment of the Town taxes created and at the same time perfected a specific lien is contrary to the principles applied by this Court in *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47; *Illinois* v. *Campbell*, 329 U. S. 362; and *Illinois* v. *United States*, 328 U. S. 8. In the *Security Trust & Savings Bank* case the Court reiterated that the

effect of a lien in relation to a provision of federal law for the collection of taxes owing the United States is always a federal question. This Court held that the decisions involving Section 3466 of the Revised Statutes are applicable to federal tax lien cases in determining whether or not an adverse lien has been perfected. Under those decisions, as applied to the circumstances of this case, the court below was clearly erroneous when it held that the Town's liens were specific and perfected for the purposes of taking priority over the Government's lien of August 6, 1948, and of defeating the Government's priority under Section 3466.

Here, a notice of a federal tax lien was duly filed on August 6, 1948, in an amount which exceeds the entire funds in the hands of the receiver (R. 6). The dates of the assessment of the Town taxes do not appear (R. 6). However, the lower court held that after April first of any year "(or at least after assessment for such year * * *)," title to the machinery was encumbered by the lien of the Town for the tax for such year (R. 7). There is no showing that anything was done to perfect the Town's lien prior to the date the Government's notice of tax lien was filed. Any steps taken thereafter could not relate back to the date of assessment. *United States* v. *Security Trust & Savings Bank, supra.*

Section 3466 of the Revised Statutes came into play on August 12, 1949, the date the receivers were appointed. *United States* v. *Oklahoma,* 261 U. S. 253. The property, which consisted of machinery located on leased premises, had been "sold" for the

time for filing a petition for a writ of certiorari to and including November 7, 1952. (R. 11) The petition for a writ of certiorari was filed November 7, 1952, and was granted January 5, 1953 (R. 13). The jurisdiction of this Court is conferred by 28 U. S. C., Section 1257 (3).

## QUESTIONS PRESENTED

1. Whether the mere assessment of a town tax renders the Town a "judgment creditor" within the meaning of Section 3672 of the Internal Revenue Code, so as to defeat the tax lien of the United States accorded by Section 3670 of the Code.

If the above question is answered in the negative, the tax lien of the United States is paramount to that of the Town and no other question need be decided. If it is answered in the affirmative, then the following questions remain:

2. (a) Whether the Town's lien was sufficiently specific and perfected to defeat the priority rights accorded the United States by R. S. 3466 (31 U. S. C. 191) in the collection of debts owed by an insolvent.

(b) Whether the priority rights of the United States under R. S. 3466 may in any event be defeated by an adverse lien which, though otherwise specific and perfected, has not been enforced to the point of divesting the insolvent debtor of the property subject to the lien.

## STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Appendix, *infra*, pp. 49–54.

## STATEMENT

This case involves the relative priority of tax claims of the United States and of the Town of Walpole, New Hampshire, against the estate of an insolvent corporation in receivership, Gilbert Associates, Inc., sometimes referred to hereafter as the taxpayer.[1]

Temporary receivers were appointed for the corporation by the Superior Court of New Hampshire on August 12, 1949, and a permanent receiver was appointed January 30, 1950. The property of the corporation, which was taken over by the receivers, consisted of machinery in an electroplating plant which the corporation had operated in a rented building in the Town of Walpole. (R. 1, 5.)

The claims of the United States are for employment, withholding and income taxes which became due for various periods between 1943 and June 30, 1948, and with respect to which a notice of lien in the amount of $3,171.97 was filed in the office of

[1] The entire record in this case consists of the Reserved Case on appeal from the Superior Court to the Supreme Court of New Hampshire. (R. 1–4.) No evidence was taken, the controversy being submitted on memoranda from which the Superior Court made its findings of fact and rulings of law.

the Clerk of the United States District Court for the District of New Hampshire on August 6, 1948. The Town's claims are for property taxes for the years 1947 and 1948, in the respective amounts of $612.95 and $690.85, imposed by the laws of New Hampshire.[2] On September 25, 1948, after the recording of the federal tax lien, the taxpayer's "property" was "sold" for the Town's 1947 tax. On September 24, 1949, after the appointment of the temporary receivers, the taxpayer's "property" was again "sold" for the Town's 1948 tax. Thereafter the same property was again sold by the receiver and, after payment of administration expenses and fees of the receivership, a balance of $2,642.91 was left in the hands of the receiver. Both the United States and the Town claim priority of payment from this amount. (R. 1, 5–6.)

The Superior Court of New Hampshire ruled that the Town's tax assessments created specific and perfected liens against the taxpayer's property which were prior and superior to the tax liens of the United States. (R. 3.) The Supreme Court of New Hampshire affirmed, holding that the Town's assessments constituted the Town a

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[2] The Town's claims originally included property taxes for the years 1949 and 1950, but these are no longer in issue. The Town conceded below that its claim for the 1949 tax is not entitled to priority (R. 6), and the Government does not challenge the holding of the court below (R. 9) that the Town's 1950 tax is entitled to priority of payment as an administration expense of the receivership.

"judgment creditor" of the taxpayer within the meaning of Section 3672 of the Internal Revenue Code, and also that the Town's liens were sufficiently specific and perfected to defeat the priority accorded claims of the United States against the insolvent debtor under R. S. 3466. (R. 6–9.)

## SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that the Town became a "judgment creditor" of the taxpayer within the meaning of Section 3672 of the Internal Revenue Code merely by assessing a tax against the taxpayer, and that therefore its tax lien was superior to the tax lien accorded the United States by Code Section 3670.

2. In holding that the Town's tax lien automatically divested the taxpayer of property to which the federal tax lien could attach.

3. In holding that the Town's tax lien was sufficiently specific and perfected to defeat the priority accorded the United States by R. S. 3466 in the collection of claims against an insolvent debtor.

4. In holding that the tax claims of the Town, rather than of the United States, were entitled to priority of payment from the assets of the taxpayer in the hands of the receiver.

## SUMMARY OF ARGUMENT

### I

Section 3670 of the Internal Revenue Code vests in the United States a lien for unpaid taxes

on "all property * * * belonging to" the delinquent taxpayer. Enacted pursuant to the constitutional authority of Congress to lay and collect taxes, its purpose is to insure the prompt and certain collection of the federal revenues. *United States* v. *Security Trust & Savings Bank*, 340 U. S. 47, 51. The federal tax lien cannot be impaired by state law or judicial decision, and is paramount to all adverse liens except those specifically enumerated by Congress in Section 3672 of the Internal Revenue Code, namely, those arising in favor of a "mortgagee, pledgee, purchaser, or judgment creditor" before the federal lien is recorded.

The court below erred in holding that the Town became a "judgment creditor" of the taxpayer, and hence fell within the exception provisions of Section 3672, merely by assessing taxes against the taxpayer. In excepting a "judgment creditor" from the priority of an unrecorded tax lien, Congress used that term in its conventional sense. Under its generally accepted meaning, a "judgment" is procured in a court proceeding, and does not include tax assessments made by administrative officials. The New Hampshire statutory scheme under which the Town taxes were assessed bears no similarity to the procedure under which a judgment is obtained. Moreover, the legislative history of Section 3672 indicates that Congress was sparing in the exceptions carved out in that

section, and that it did not intend, by excepting a "judgment" lien from the superiority of an unrecorded federal tax lien, to grant superiority to state or municipal tax liens which have not ripened into judicial judgments.

That a state statute or state court decisions characterize a local tax assessment as a "judgment" for some local purposes is not, as the court below assumed, conclusive of its character for purposes of applying the federal tax lien statute; it is well settled that the relative priority of the federal tax lien and of adverse liens created by state law is always a federal question. To hold that a local tax assessment constitutes the assessing authority a "judgment creditor" within the meaning of Section 3672, merely because the state law so labels or treats the assessment, would permit any state to nullify the federal tax lien statute within its borders simply by expanding the carefully limited exceptions specified by the Congress. Here, as elsewhere in the law, substance and not labels must be controlling. Moreover, it would do violence to the established rule that the federal revenue laws are to be interpreted to give a uniform application to a nationwide scheme, unless by express language or necessary implication the particular provision involved makes its operation dependent upon state law. Nothing in the language of the federal tax lien statute, expressly or by necessary implication, warrants the view, upon which the decision below primarily rests, that state law de-

termines whether the state or one of its subdivisions is a "judgment creditor" of a delinquent taxpayer, as that term is used in Section 3672.

The error of the court below is compounded by its dual assumptions that the Town taxes were assessed (and its lien arose) before the federal taxes, and that this "divested" the taxpayer of property to which the federal lien could attach. The dates of assessments of the Town and federal taxes do not appear in the record, and there is no more basis for supposing that the Town's lien arose before the federal lien than the converse. But even assuming that the Town's lien antedated the federal lien, that would not serve to defeat the federal priority. The mere existence of an adverse lien does not automatically divest the taxpayer of property to which the federal lien attaches. The federal lien arose no later than the date it was recorded, and the Town had not divested the taxpayer of any property prior to that date. If the Town had acquired a "judgment" lien before the federal lien was recorded (regardless of when the two liens respectively arose), it would have come within the protection of Section 3672, but the decisive fact here is that it never acquired such a lien at any time.

## II

If the Town is not a "judgment creditor" within the meaning of the federal tax lien statute, the

federal lien is paramount to the Town's lien and there is no need to determine whether the federal tax claim is, alternatively, entitled to priority of payment under R. S. 3466, which directs that "Whenever any person indebted to the United States is insolvent, * * * the debts due to the United States shall be first satisfied." On the other hand, even if the Town were deemed a judgment creditor, the federal claim would nonetheless take precedence under the general priority statute, since the claims in question are being asserted against the assets of an insolvent taxpayer in receivership.

This Court has repeatedly held that an adverse lien (including a judgment lien and a local tax lien) which has not become "specific" and fully "perfected" before the debtor's insolvency cannot overcome the priority of the United States under R. S. 3466, irrespective of the effect of the lien under state law and as to parties other than the United States. Under the decisions of this Court, an adverse lien is not "specific" unless it attaches to a definitive portion of the debtor's property and severs it from the debtor's other assets; it is not "perfected" unless the lienor has divested the debtor of title to or possession of the assets subject to the lien. And it is believed that in every case in which it has dealt with the relative priority of an adverse lien and the claim of the United States, the Court has held that the